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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 142

GEORGE WILLIAM MOTTRAM, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF ON BEHALF OF THE UNITED STATES

OPINION BELOW

The opinion in the Court of Claims (R. 16) is reported in 59 C. Cls. 302.

JURISDICTION

The judgment to be reviewed was entered on March 3, 1924. (R. 19.) A motion for a new trial was made April 7, 1924, and denied April 14, 1924. (R. 19.) Appeal was taken June 16, 1924. The brief of appellant does not so state, but it is assumed that the appeal was taken under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, ch. 229, 43 Stat. 936, 941). The Government contends, however, that in this case the Court of Claims had no jurisdiction and that its judgment

should be affirmed on this ground irrespective of the merits. The amended petition filed herein states that "your Petitioner (appellant) is a subject of His Majesty, the King of Great Britain, and has his residence at 39 Prince's Square, Bayswater, London, W., and place of business at No. 1, Montague Street, Russell Square, formerly at 161 New Bond Street, London, England, where he carries on business as a General Merchant." (R. 5.)

Section 155 of the Judicial Code (36 Stat. 1139) provides that "aliens who are citizens or subjects of another government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, may take jurisdiction." The Government contends that before the Court of Claims has jurisdiction of a suit filed by an alien in such court the petition must allege that the government of which such alien is a citizen or subject accords to citizens of the United States the right to prosecute claims against such government in its courts. Whether a foreign government accords to citizens of the United States this right is a question of foreign law, and in the courts of the United States the foreign law must be pleaded and proven as a fact. As stated by this Court in the case of *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, at page 445:

> The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country can not be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved.
>
> The rule that the courts of one country can not take judicial cognizance of the law of another *without plea and proof* has been constantly maintained, at law and in equity, in England and America. (Italics ours.)

This quotation was supplemented by the citation and discussion of a number of American and English cases to which the Court's attention is invited. The principle thus stated was followed in *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 228, and is settled law.

The Government contends that an allegation to the effect that Great Britain, at the time this suit was filed in the Court of Claims, accorded to citizens of the United States the right to prosecute claims against such government in its courts was indispensable to confer jurisdiction upon the Court of Claims. Appellant having failed to make this essential allegation of jurisdictional fact in his petition, the Court of Claims had no jurisdiction of this suit in the first instance and its judgment of dismissal, even though not on the ground of lack of jurisdiction, should be affirmed.

We need not discuss or decide whether this defect can be cured by proof and proper findings of fact,

because an examination of the findings of fact in this case reveals that the same are entirely silent upon this important and jurisdictional fact.

Again, we need not consider whether the question was raised in or decided by the lower court, as we submit that the question is a jurisdictional question and can be raised at any time in any court. Even though the parties do not raise the question, if the court discovers the existence thereof, it may *sua sponte* rule thereon. *King Bridge Co.* v. *Otoe County,* 120 U. S. 225; *Chi., B. & Q. Ry. Co.* v. *Willard,* 220 U. S. 413, 419; *Barnett* v. *Kunkel,* 264 U. S. 16, 19; *Mahler* v. *Eby,* 264 U. S. 32, 45. In the *King Bridge* case it was said (p. 226):

> That the point as to jurisdiction was not made here by either party is immaterial, because, as said in *Mansfield, &c., Railway Co.* v. *Swan,* 111 U. S. 379, 382, "the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes." See

also *Hancock* v. *Holbrook,* 112 U. S. 229, 231.

We submit, therefore, that even though the dismissal of the suit by the Court of Claims was not based upon lack of jurisdiction, such dismissal was proper, and that the judgment of dismissal should be affirmed.

THE QUESTION

This action is based upon a claim for an alleged breach of a contract of sale by the United States to appellant of surplus war materials located in England. The appellant contends that there was a binding contract, as the result of an auction sale, to deliver a certain stated quantity of Garlock steam packing; that the Government refused to deliver the same and is liable in damages for the difference between the then market value of such steam packing and the price which appellant agreed to pay for the same at said sale. The amount of such steam packing had been erroneously stated in the catalog of the auction sale, and the Government at the time of such sale did not have at the place of sale one per cent of the quantity of such packing set out in said catalog. Appellant claims that he purchased the amount stated in the catalog.

The main questions, therefore, are (1) whether the Court of Claims had jurisdiction; and (2) whether the Government was justified in its refusal to deliver the material which appellant claims he bought.

STATEMENT

The facts as found by the Court of Claims are as follows:

The Act of Congress approved May 10, 1918, c. 70 (40 Stat. 548), authorized the President "to sell any supplies, materials, equipment or other property heretofore or hereafter purchased, acquired, or manufactured by the United States in connection with, or incidental to, the prosecution of the war." (R. 5.) The President, under said statute, created through the Secretary of War the United States Liquidation Commission by virtue of General Orders No. 24, dated February 11, 1919. This order authorized the disposal of all property belonging to the United States which was located beyond its territorial limits. (R. 6.) On April 1, 1918, the Liquidation Commission was designated by the Secretary of War to supervise and direct the disposition of all surplus property in Europe belonging to the United States acquired, constructed, or manufactured in connection with the war. (R. 6.) On April 14, 1919, under the statute of May 10, 1918, and the orders above mentioned, the United States entered into a written contract with J. G. White & Co., Ltd., London, England.

By Article I of that contract, White & Co. were created selling agents to sell "certain quantities of engineer stores and equipment now in storage at the United States engineer depots at Slough and Didcot, or at Supplier's Works, or at such other

locations as the contracting officer may designate, such stores and equipment being enumerated and described in an inventory compiled by the contracting officer." (R. 6.)

Article II of the contract provided that "all material shall be offered at duly advertised public auction." (R. 6.)

Article III provided that "the selling agents shall supply at their own expense all auctioneers, cashiers, accountants, salesmen, engineers, and assistants required, except laborers, for the preparation of catalogues, listing and describing the various classes of stores and equipment from the inventories furnished by the contracting officer; distribution of same, conduct of auctions and sales, collection of moneys, preparation of accounts as required by the contracting officer, supervision of delivery of goods sold and payment for same to the contracting officer. The selling agents shall advertise the public auctions at their own expense and shall bear all expenses in connection with the sale and delivery of stores and equipment sold by them, except the cost of labor required in handling said stores and equipment." (R. 7.)

Article IV provided for a commission of 5 per cent for White & Co. for its services. (R. 7.)

Article XII provides "the contracting officer assumes no liability for claims of any character that may be made by purchasers against the contracting officer, and the selling agents shall hold and

save the contracting officer and his authorized representatives free and harmless from and against all and every claim by purchasers and prospective purchasers, that may arise from the operations incident to this agreement." (R. 8.)

Article XIII, among other things, provides "the description and quantities, as stated in the inventories of the contracting officer, are subject to verification by the selling agents, and the contracting officer assumes no liability for the accuracy of such descriptions and quantities." (R. 8.)

White & Co. employed Robert H. Ruddock, of London, to sell at auction this property, and acting under the contract White & Co. advertised in the press of England the sale by auction thereof. (R. 9.) White & Co. also issued a catalog purporting to contain a list of the goods with description and quantity of the same. (R. 9.)

The second paragraph of the conditions of the sale, on page 2 of the catalog, stated that "the whole shall be sold, with all faults, imperfections, and errors of description, in the lot of the catalogue; or as these may be divided or conjoined at the sale, and without any warranty whatever, the buyers being held to have satisfied themselves as to the conditions, quality, and description of the lots before bidding." (R. 10.)

Paragraph 5 of these conditions provided that "the lots [were] to be at the purchaser's expense and risk from the fall of the hammer, and to be

taken away with all faults and imperfections and errors of description, at the purchaser's risk, within seven days of the last day of sale." (R. 10.)

Paragraph 8 of these conditions provided that "inasmuch as the auctioneer acts only as agent, he shall not be considered personally responsible for any default on the part of either purchaser or vendors." (R. 11.)

Lots numbered 1256 to 1277, both inclusive, were for packing. Of these lots numbered 1267 to 1277, both inclusive, were for Garlock packing, each of said lots being stated as so many hundredweight Garlock packing of certain diameters. (R. 12.) Lieut. David A. Hart was post commander of the United States Army Engineer Depot at Slough, England, during the times here in question, and, preparatory to the sale by auction of the stores and equipment in said depot, prepared an inventory of said stores and equipment at said depot. (R. 12.) The original sheets thereof were sent daily to the office of Capt. Smith of the Army and were there transcribed and furnished by him to White & Co. (R. 12.) The originals of the inventory were rough notes, called "checker's notes," and were in pencil, and the stenographers in Capt. Smith's office transcribed them from said notes to mimeographed sheets, which sheets were transmitted to White & Co., whose duty it was, under the contract, to prepare the catalog listing and describing the property "and whose duty it was under its contract to

verify the descriptions and quantities stated in the inventory furnished by the contracting officer." (R. 13.) In preparing the mimeographed sheets the stenographers read the abbreviation in the notes intended for pounds for hundredweights, and so recorded it on the mimeographed sheets concerning the Garlock steam packing, which sheets were used by White & Co. in preparing the catalog and were not verified by them. (R. 13.)

The catalog was published and circulated at least a week before the sale, and appellant received notice in advance of the sale through notices in the press and from the catalog which was furnished him at his request by the auctioneer. Appellant attended the sale, and " when the Garlock steam packing was offered for sale bid upon the same *after the question of the quantity of said packing had been raised and after the auctioneer had stated that he could not guarantee any quantity.*" (Italics ours.) (R. 13.) Lots 1268 to 1277 of Garlock packing were knocked down to appellant at 3¼d. per pound. The quantity in pounds appeared in the catalog to be 278,432 pounds. (R. 13.) Appellant, before the sale, had made repeated visits to this engineers' depot "and had full opportunity to acquaint himself with the character and quantity of supplies which were to be sold at the auction sale. At his request the Garlock steam packing was pointed out to him by one of the employees of the depot on the day before the sale. *The Garlock*

steam packing was all housed together in a part of one warehouse, and it was shown to the plaintiff and he was given full opportunity to arrive approximately at its quantity. He then had the catalog which listed for sale 278,432 pounds of Garlock steam packing. It would have required 560 cases to hold that amount of packing and would have required 15,000 cubic feet of space to house it. Such a quantity would have supplied the needs of Great Britain for Garlock packing for twenty years. On many occasions the plaintiff, prior to June 24, 1919, was at the depot, and was given every facility to inspect the goods and supplies which were stored there and which were afterwards sold at the auction sale aforesaid." (Italics ours.) (R. 13 and 14.)

The auctioneer did not know of the mistake in the catalog and did not know that the quantities listed therein were not present in the depot. In due course the auctioneer rendered appellant a bill for the purchases he had made, which included 278,432 pounds of this packing at the price bid. Appellant gave his check to White & Co. for an amount including payment for this packing, and the check was cashed by White & Co. When the check was accepted by White & Co., it knew there was no such quantity of Garlock packing in the depot. (R. 14.) On July 4, 1919, appellant was notified by telephone by the auctioneer " that it would be useless for him to present his delivery slip at the depot warehouses for the Garlock pack-

ing as a mistake had been made in the quantity listed in the catalogue, and no such quantity was present in the depot and had never been there." (R. 14.) Appellant wrote White & Co. that he expected delivery of the quantity for which he had paid. White & Co. replied, stating how the mistake had been made, and that it considered the explanation sufficient to close the incident, with the return of the money paid. Appellant replied that he would hold White & Co. to the contract. (R. 14.) Appellant made repeated demands of White & Co. to deliver 278,432 pounds of Garlock steam packing, but White & Co. refused to deliver, "upon the ground that it was not and never had been in existence." (R. 14.)

On August 18, 1919, Ruddock, auctioneer, wrote the appellant stating that he gave notice that the sales of all the lots of packing purchased by the appellant are canceled by reason of arrangements arrived at by the bidders, which restricted free bidding for the same, and enclosed a check by White & Co. for the purchase money paid. (R. 15.) Appellant repudiated the charges of collusive bidding and refused to accede to the cancellation and returned the check. After this it was agreed between the appellant's counsel and counsel for White & Co. that appellant would accept a return of the money paid for the packing, with the understanding that the rights of neither party should be prejudiced thereby. Thereupon appellant received from White & Co. the money he had paid for this packing. (R. 15.)

Appellant, immediately after the sale, sold certain portions of this packing at an increased price over that which he had bid. All moneys paid upon such sales were returned by appellant and no packing was delivered. (R. 15.)

The packing actually at the engineers' depot was sold by White & Co. by private sale at 3¼d. per pound on October 22, 1919. (R. 15.)

On June 30 appellant gave an option upon some of the packing, which option contained the following: "subject to the quantity being in stock as sold by the U. S. A." (R. 15.)

ARGUMENT

SUMMARY

1. The Court of Claims had no jurisdiction of this suit, and its judgment should be affirmed on this ground, irrespective of the merits.

2. Appellant was bound by the limitations of authority contained in the statute and orders under which the auction sale was conducted, as well as the limitations contained in the contract between the United States and White & Co., all of which preclude a recovery by appellant.

3. The terms of the auction sale, as contained in the catalog, as well as the statement of the auctioneer at the sale, negative any warranty as to quantity and preclude a recovery by appellant.

4. Neither the United States, White & Co., nor the auctioneer knew of the error in the cata-

log, while appellant had notice thereof and is thereby precluded from a recovery.

5. Even if the alleged contract of sale was otherwise valid, the same is in violation of Section 3744 of the Revised Statutes, and appellant can not recover thereunder.

I

The Court of Claims had no jurisdiction of this suit, and its judgment should be affirmed on this ground, irrespective of the merits

This question has been heretofore fully discussed under the heading "Jurisdiction" in this brief, and a repetition thereof is unnecessary.

II

Appellant was bound by the limitations of authority contained in the statute and orders under which the auction sale was conducted, as well as the limitations contained in the contract between the United States and White & Co., all of which preclude a recovery by appellant

The Act of May 10, 1918, c. 70 (40 Stat. 548), provided as follows:

> That during the existing emergency the President be, and he hereby is, authorized, in his discretion, and upon such terms as he shall deem expedient, through the head of any executive department, to sell any supplies, materials, equipment or other property heretofore or hereafter purchased, acquired, or manufactured by the United States in connection with, or incidental to,

> the prosecution of the war, to any person, partnership, association, or corporation, or to any foreign State or Government engaged in war against any Government with which the United States is at war; and any moneys received by the United States as the proceeds of any such sale shall be covered into the Treasury of the United States and a full report of the same shall be forthwith submitted to Congress.

This statute clearly shows that the purpose thereof was to dispose of the surplus materials which the Government had acquired in the prosecution of the war. The Government was not then and never had been engaged in the business of the manufacture or sale of steam packing or other similar equipment. The officers were authorized by this statute to sell only the amount of property which it had on hand, and there was no thought or idea that the Government should sell any other amount or quantity. This purpose should permeate all of the facts and negotiations in the transaction here involved and is a positive limitation by statute upon the authority of the Government and its officers in such transactions. The appellant, by such statute, is charged with notice of these limitations and must deal with the officers of the United States in accordance therewith. *Whiteside* v. *United States*, 93 U. S. 247, 257; *Hawkins* v. *United States*, 96 U. S. 689, 691; *The Floyd Acceptances*, 7 Wall. 666, 680.

General Orders No. 24, dated February 11, 1919, creating the Liquidation Commission, and authorizing the disposition of surplus property, was limited to that property "*belonging* to the United States and which was located beyond its territorial limits." (R. 6.) The order of April 1, 1919, directing the Liquidation Commission to supervise the sales of this property, was likewise limited to sales of the property "*belonging* to the United States acquired, constructed, or manufactured in connection with the war." (R. 6.) The contract entered into by the Army officers on behalf of the United States with White & Co. appointed White & Co. as sales agents to sell "certain quantities of engineer stores and equipment *now in storage* at the U. S. engineer depots at Slough and Didcot or at Supplier's Works, or at such other locations as the contracting officer may designate." (R. 6.)

This contract further provided that "the description and quantities, as stated in the inventories of the contracting officer, are subject to verification by the selling agents, and the contracting officer assumes no liability for the accuracy of such descriptions and quantities." (R. 8.) The conditions of the sales as stated in the catalog which was issued (R. 10 and 11), as well as the designation of materials in the catalog, indicate that the sale was to be by lots of *then existing* property which was stored in said depot. Even the auctioneer at the time of the

bid by appellant stated in response to a question as to the quantity of said packing "that he could not guarantee any quantity." (R. 13.) All of these facts, as well as the statutes, show that the authority of the United States and its officers was limited to a sale of the properties then stored in this depot whatever the amount thereof might be, and that the officers or agents had no authority to offer for sale or to sell any amount in excess of the quantities then on hand at said depot.

That the appellant is chargeable with notice of and bound by the limitations of authority of the officers as contained in the statute is so familiar a rule of law that it does not admit of argument. That appellant "in dealing with an agent of a third person must look into the authority of the agent" has been admitted by appellant in its brief in this Court at page 16, and we therefore need to state no authorities in support of that proposition.

We submit that in view of this situation, the limitations of authority from the statute, the orders, the contract with White & Co., and the statements made by the auctioneer at the time of the sale, being clear upon the question that they had no authority to bind the Government to any amount in excess of the supplies then on hand at the depot, any recovery by the appellant herein is precluded.

This Court recently considered this question in the case of *Lipshitz & Cohen* (unreported, decided November 16, 1925). In this opinion, which is set out in the Appendix to this brief, the contention

of the Government as above set forth was sustained. The Court of Claims has also had this question before it for decision, and in the case of *Hummel, Trustee of James S. Miller Co.* v. *United States,* 58 C. Cls. 489, sustained this contention.

III

The terms of the auction sale, as contained in the catalog, as well as the statement of the auctioneer at the sale, negative any warranty as to quantity and preclude a recovery by appellant

The terms of the auction sale, as contained in the catalog, as well as the statement of the auctioneer at the sale, negative any warranty as to quantity and preclude a recovery by appellant. Paragraph 2 of the conditions of sale, which were printed in the catalog, stated, " the whole shall be sold, with all faults, imperfections, errors of description, in the lots of the catalogue; * * * and *without any warranty whatever,* the buyers being held to have satisfied themselves as to the condition, quality, and description of the lots before bidding." (Italics ours.) (R. 10.) Paragraph 5 of such conditions provides, " the lots to be at the purchaser's expense and risk from the fall of the hammer, and to be taken away with all faults and imperfections and errors of description, at the purchaser's risk, within seven days of the last day of sale." (R. 10.) On the day of the sale and before the bid by appellant, when the Garlock steam packing was offered

for sale, the question of the quantity of said packing had been raised, and "the auctioneer had stated that he could not guarantee any quantity." (R. 13.) Even if the Government was bound by a statement of any amount in the catalog (which we do not concede), the statement in the catalog itself that the sales were "without any warranty whatever" and that the buyers must satisfy themselves as to the descriptions and that errors of description were at purchaser's risk show conclusively that there was no obligation upon the Government to deliver any specific quantity.

The Government was selling certain lots of packing, designating EACH LOT by number, without guaranteeing or in any way assuring any purchaser as to the amount contained in such lots. The purchaser bought whatever the lots might contain, and no more. But in this case, at the very time of the sale and before the bidding by appellant, the question of quantity was specifically raised and the auctioneer stated that no quantity could be guaranteed. With these facts, we do not see how it could be seriously contended that the Government was bound to deliver any certain quantity of goods. It was only a sale of certain lots of goods, whatever the quantity in such lots might actually be. The Government contends that the case of *Lipshitz & Cohen, supra,* decided by this Court, is controlling upon this question.

IV

Neither the United States, White & Co., nor the auctioneer knew of the error in the catalog, while appellant had notice thereof and is thereby precluded from a recovery

The facts found by the Court of Claims show that the error resulted from the transcribing of an inventory in which the quantities stated as pounds were erroneously transcribed as hundredweights. (R. 13.) The record also conclusively shows that neither the United States nor White & Co. knew of such error. The court below found that the auctioneer did not know of the mistake at the time of the sale (R. 14); that White & Co. had learned of the mistake before the cashing of the check given by appellant in payment (R. 14). The record further shows that appellant made repeated visits to the engineers' depot " and had full opportunity to acquaint himself with the character and quantity of supplies which were to be sold at the auction sale." At his request the Garlock steam packing was pointed out to him by one of the employees of the depot on the day before the sale. The Garlock steam packing was all housed together in a part of one warehouse and it was shown to the plaintiff and he was given full opportunity to arrive approximately at its quantity. He then had the catalog, which listed for sale 278,432 pounds of Garlock steam packing. It would have required 560 cases to hold that amount of packing and it would have required 15,000 cubic feet of

space to house it. Such a quantity would have supplied the needs of Great Britain for Garlock packing for 20 years. On many occasions the plaintiff, prior to June 24, 1919, was at the depot and was given every facility to inspect the goods and supplies stored there and which were afterwards sold at the auction sale aforesaid. (Finding VII, R. 13 and 14.)

It is also shown that before appellant's bid the question of quantity was raised and any warranty was denied. (R. 13.) On June 30th, only 5 days after the bid by appellant, in an option given by him upon a portion of this packing, he caused to be inserted the following: "subject to the quantity being in stock as sold by the U. S. A." (R. 15.) By operation of law appellant was chargeable with notice of the limitations upon the authority of the officers of the Government and its agents in the sales of surplus property whether such limitations were created by statute or by the orders of the War Department or by the contracts with White & Co. or otherwise.

The catalog also imposed the burden upon appellant to ascertain the correctness of the descriptions of the properties listed. The auctioneer stated that there would be no warranty as to quantity. The appellant had frequently visited the storehouse and had inspected the packing, his last visit and examination being on the day immediately preceding the sale. He was familiar enough with this material to undertake to bid and speculate upon the same and

to make an examination and inspection thereof. Can it be reasonably believed that when he saw the material there stored, he did not know that the quantity stated in the catalog was not present, in view of the fact that such quantity would have required 100 times the space of the quantity then on hand? Certainly, from these facts, he was chargeable with notice that the quantity listed in the catalog did not exist. The fact that such a quantity as listed would have supplied the needs of Great Britain for 20 years would have been ample notice to him of the nonexistence of such a quantity, in view of the further fact that he was sufficiently qualified to undertake to speculate upon such goods. The conclusion is irresistible that he actually knew that such goods did not in fact exist and, as the Court of Claims said in its opinion, that he was trying to get something for nothing. (R. 17.)

These conclusions are further borne out by his actions in undertaking to buy this property in the face of a denial by the auctioneer of any warranty as to the quantity, as well as the fact that in the subsequent option which he gave upon such property he took the pains to limit his liability by the statement that such option was "subject to the quantity being in stock as sold by the U. S. A."

If appellant knew these matters, or was chargeable with notice thereof, then we contend that he was guilty of such bad faith in the premises as to cause the contract to be unenforceable by him. Appellant contends that he is not required as a

buyer to disclose matters within his knowledge. Without discussing in detail the general rules upon this question, we think it sufficient to say that in so far as this transaction is concerned, in view of the limitation upon the authority of the officers and agents of the Government created by law and by orders of the War Department in such transaction, as well as the purposes to be accomplished by the statute and the sales thereunder, appellant can not be heard to say that he knew that some mistake had been made but that he was under no obligation to advise the Government thereof and could hold them to such an unfair and unconscionable agreement. If, on the other hand, it should be contended that appellant did not know of this mistake and did not know this quantity was not then on hand, then we submit there was such a material mistake of fact that the minds of the parties never met and there was no agreement.

V

Even if the alleged contract of sale was otherwise valid, the same is in violation of Section 3744 of the Revised Statutes, and appellant can not recover

The agreement relied upon by appellant in this case consists of the oral bid by appellant and the oral acceptance thereof by the auctioneer at an auction sale. Section 3744 of the Revised Statutes provides as follows:

> It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of

> the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as is possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return.

Even if any agreement existed in this case, the same was not reduced to writing and signed by the contracting parties with their names at the end thereof, as required by said statute. It is therefore unenforceable by appellant. This question was decided by this Court in the case of *Erie Coal & Coke Corporation* v. *United States,* 266 U. S. 518, 521. The appellant therefore can not recover in this suit.

CONCLUSION

We submit, therefore, that (1) the Court of Claims had no jurisdiction and that its judgment of dismissal should be affirmed on this ground, irrespective of the merits; and that (2) even should this Court hold that the Court of Claims had jurisdiction, for the reasons above set forth the judgment of the Court of Claims dismissing the petition should be sustained.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.

JANUARY, 1926.

APPENDIX

Supreme Court of the United States.—No. 68.—October term, 1925.—*Lipshitz & Cohen,* a partnership composed of Berel S. Lipshitz and Morris Cohen, Plaintiff in Error, *vs.* The United States of America. In Error to the District Court of the United States for the Northern District of Georgia. [November 16, 1925.]

Mr. Justice McReynolds delivered the opinion of the Court.

Plaintiffs in error seek to recover profits which, it is alleged, would have been realized if the United States had complied with their agreement to deliver approximately 1,530,600 pounds of obsolete material. The cause was heard by the District Judge without a jury. He found the facts and upon them held that the contract had not been broken.

An agent of the United States put out a schedule which stated that certain obsolete material, classed as cast iron, cast and forged steel, armor steel, brass, bronze and lead, was held for sale at six specified forts. It set out the weights of each class at each place, and was headed—" List of junk for sale and location of same. The weights as shown below are approximate and must be accepted as correct by the bidder." Plaintiffs in error made a written offer at the foot of the schedule sheet to pay $1,055, " for all the above described material, as is where is, for which we are enclosing you cashier's check for 20% of the amount—$211—with our option to remove material within six months from acceptance of this bid * * *." This was

accepted May 24, 1922. "At the time the offer was made and accepted the plaintiff did not inspect the material for sale at any of the fortifications, and had no knowledge of such material other than that given by the contract. It was later found in junk piles at the various forts."

In the following July the purchasers began to remove the material and found nearly all items short. Aggregated these shortages amounted to approximately one-half of the total weight stated in the original schedule, but there is nothing to indicate bad faith. They complained but made no effort to repudiate or annul the contract.

Supporting his judgment in favor of the United States the District Judge said—" Since the Government is not in the business of buying and selling and its agents are authorized only to offer for sale such material as has been condemned as obsolete or useless, taking the language of this offer and acceptance I am of the opinion that the contract must be construed as one offering to sell an approximate quantity of such cast iron, brass [cast and forged steel, bronze, armor steel] or lead, and as one offering to sell all of the materials of these descriptions which were on hand at the various points named, the intention being not to make a sale by the pound or ton, but to make an entire sale of specific lots of obsolete material, whether more or less than the weight, and to include all thereof. * * * I am satisfied that they [plaintiffs] cannot claim that this contract, worded as it was, has been broken because it turned out that there was less, even greatly less, of some of the materials described as on hand than the description would have led the purchaser to suppose. It is not made to appear

that the United States failed or refused to deliver any of the material that was actually at the forts named at the time the contract was made."

We approve this construction of the agreement. Applicable principles of law were announced by Mr. Justice Bradley, speaking for the court in *Brawley* v. *United States*, 96 U. S. 168, 171. The negotiations had reference to specific lots. The naming of quantities cannot be regarded as in the nature of a warranty, but merely as an estimate of the probable amounts in reference to which good faith only could be required of the party making it.

It is not necessary for us to consider whether the contract is sufficiently formal to comply with the requirements of R. S. 3744.

The judgment of the court below must be *affirmed.*

(A true copy. Test:——— ——— *Clerk, Supreme Court, U. S.*

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